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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. [redacted], Original

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING.
Defendant.

BRIEF OF PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT IN SUPPORT OF ITS MOTION FOR LEAVE TO INTERVENE.

ARTHUR F. MULLEN,
Attorney for Petitioner.

GEORGE F. SHEA,
Of Counsel.

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vs.

THE STATE OF WYOMING.

Defendant.

BRIEF OF PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT IN SUPPORT OF ITS MOTION FOR LEAVE TO INTERVENE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The allegations of the Bill of Complaint, in summary, allege that the North Platte River has its source in Colorado, enters and traverses Wyoming and crosses the State line into Nebraska; that Wyoming and her officers are under the duty to administer these waters fairly and to control appropriators whose rights arise under the law of Wyoming from encroaching upon the rights of Nebraska appropriators by diminishing the flow so that the latter are

unable to obtain the waters embraced within their appropriations; and that Wyoming and her officers have disregarded such duty and have permitted wrongful diversions of waters belonging to Nebraska appropriators.

In the prayer for relief the complainant, among other things, asks this Court to find and determine the equitable shares of the waters of the North Platte River to which the complainant is entitled and the respective priorities of the various appropriators of such waters in Wyoming and Nebraska.

Petitioner, a public corporation organized and existing under the laws of the State of Nebraska, is an appropriator of the waters of the North Platte River. By virtue of a statute it is authorized and empowered to construct and maintain irrigation works and electrical plants and systems for the generation, transmission and sale of electrical energy.

In January and February, 1934, it made four applications to the State of Nebraska for the use of varying amounts of waters in the North Platte River. Each application was approved and allowed by the State of Nebraska and is now in full force and effect. Petitioner has undertaken to borrow $7,250,000 from the Public Works Administration of the United States for the purpose of constructing the necessary facilities to make possible the agricultural and manufacturing uses of the waters of the North Platte River for which it was organized. The Public Works Administration has agreed to loan this amount and in addition thereto has agreed to grant to the petitioner $2,450,000 for the same purposes. Of said aggregate sum, the Public Works Administration has already advanced approximately $5,500,000, of which approximately $5,000,000 has already been used in constructing such facilities.

To liquidate its obligations, petitioner requires sufficient water under its filings to operate its irrigation

and power facilities. The failure or depletion of the water supply in the North Platte River, because of the alleged acts of defendant or its citizens, will work economic disaster to petitioner.

Among other things, defendant in the first of its three defenses, alleges that complainant, the State of Nebraska, in commencing and maintaining this suit,

> "is so doing only in representing private interest of residents of the State of Nebraska; that said complainant is not an appropriator or user of water from the North Platte River and does not own or have any water rights which are involved in this suit."

It further alleges:

> "That all persons, associations of persons, corporations and organizations in the State of Nebraska, which said complaint represents or purports to represent, and each of them, at the time of making filings for the purpose of appropriating water from the North Platte River, knew and had full knowledge and notice of all prior appropriations and the use of water by prior appropriators in the State of Wyoming at the time each appropriation was made and also had notice of the manner in which the defendant administers the use of the waters of the North Platte River under its laws and of the manner in which it distributes such water for use and made each respective appropriation subject thereto, and each and every such appropriator likewise had full knowledge and notice of the use of such water and of the development and improvement of lands in the State of Wyoming and of the production of crops thereon, all as hereinbefore stated; that none of said appropriators have taken any steps to prevent the course of procedure which has at all times heretofore been followed by the defendant or to secure any other or different method of adjudication, appropriation and use of the waters of the North Platte River or any other or different method of di-

viding the waters of said river as between appropriators in the State of Nebraska and appropriators in the State of Wyoming through the intervention of any Court and prior to the commencement of this action, but they have at all times recognized and abided by the administration, adjudication, use and division of said waters, as made, directed and required by the defendant."

The first defense concludes by alleging:

"That by reason of the foregoing facts * and the full knowledge and notice thereof upon the part of the complainant and upon the part of those whom the complainant represents or purports to represent, said complainant is barred by the statutes of limitations of both the State of Nebraska and the State of Wyoming and by its laches from maintaining this suit."

As stated by Mr. Justice Roberts in denying the motion to dismiss in this case (Adv. Ops. 79 L. Ed. 587, 588):

"Plaintiff and defendant alike recognize by their laws the doctrine that the waters of streams may be appropriated for beneficial use and that he whose appropriation is prior in time has the superior right."

Because of this doctrine which, as found, is mutually adopted by both States, complainant asks this Court to determine the equitable shares of waters to which the complainant is entitled and the respective priorities of the various appropriators of such waters including those of petitioner, in Wyoming and Nebraska. To do this some schedule of apportionment must be worked out which will necessarily require the adjudication of the rights of petitioner as against every other appropriator, both superior and inferior, in both the States of Nebraska and Wyoming.

Complainant, as the answer alleges, is not itself an appropriator but is acting in a representative capacity for all

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* Including those not referred to above.

appropriators in the State of Nebraska. In such representative capacity it must give equal representation to each Nebraska appropriator and, to the extent that there may be conflicting interests between such Nebraska appropriators, complainant, in the very nature of things, may not advocate the cause of one against the cause of another. In such an event, in view of the subject matter now within the jurisdiction of this Court, petitioner conceivably might have its rights passed upon and suffer irrevocable loss without adequate representation.

Moreover, in view of defendant's first defense, petitioner must intervene so that it may meet the allegations of defendant that petitioner, prior to the commencement of this suit, has abided by the administration, use and division of the waters by defendant and therefore should be deprived of rights it might otherwise have, because of its *laches*.

Petitioner, in requesting an order for leave to intervene and assert its interest in this suit, asks that such intervention be in subordination to and in recognition of the propriety of the main proceeding.

ARGUMENT.

I.

Petitioner Should Be Granted Leave to Intervene under Equity Rule 37.

This rule in part provides: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

In *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 316, 44 L. Ed. 782, 785, this Court said:

"* * * It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated."

But defendant objects to the intervention of petitioner on the ground that petitioner is not a "necessary" party nor an "indispensable" party and that only such "necessary" or "indispensable" parties should be permitted to intervene.

In *Consolidated Gas Co. of New York* v. *Newton*, 256 Fed. 238, affirmed 260 Fed. 1022, certiorari denied 250 U. S. 671, 63 L. Ed. 1199, the District Court reviewed the distinction between "necessary" parties and "proper" parties in connection with Equity Rule 37. In this case the court, while denying the intervention on grounds not applicable here, said at page 244:

"The question, then, is whether the City of New York is a 'proper' party defendant or has 'an interest in the litigation,' within the meaning of equity rule 37."

* * * * * * *

"The subject is carefully discussed by Street in his Federal Equity Practice, Vol. 1, § 507, where he accepted the rule laid down by Judge Sanborn in *Donovan* v. *Campion*, 85 Fed. 72, 29 C. C. A. 30, as follows:

(1) All those whose presence is necessary to a determination of the entire controversy must be made parties to the suit; and (2) all those who have such an interest in the subject-matter of the litigation that the decree, if it should be res adjudicata against them,

would cause them gain or loss through the direct operation and effect of the decree, may be made parties thereto, if the complainant or the court is of the opinion that their interest in the litigation may be conveniently settled at the same time as the rights and interests of the 'necessary' parties and thus the decree made to run against all those potentially affected by it.

Parties embraced under (1) above, the author quotes Judge Sanborn as pronouncing 'necessary' parties; those under (2) above, as 'proper' parties, within the concepts of a court of equity."

"In section 509 Street deals with 'proper parties', and defines them as follows:

'A proper party, as distinguished from one whose presence is necessary, to the determination of the controversy, is one who has an interest in the subject-matter of the litigation that may be conveniently settled therein.'

In view of the foregoing, and to illustrate, it may very well be that a beneficiary of a trust is a proper party, while the trustee is a necessary party."

In *Adler* v. *Seaman*, 266 Fed. 828, certiorari denied, 254 U. S. 655, 65 L. Ed. 460, the Circuit Court of Appeals of the Eighth Circuit said at page 832:

"Intervention * * * is a method of practice by which one having an interest or right, which will be affected by existing litigation to which he has not been made a party, may, if he desire, by leave of court come into that litigation to protect such interest or right. * * * It is not an independent action, but is ancillary and supplemental to the existing litigation * * *, and must, under the limitations expressed in rule 37, 'be in subordination to, and in recognition of, the propriety of the main proceeding.' The purpose of intervention is to afford an opportunity for proper parties who are not necessary to the litigation to come in, if they so desire."

Petitioner's interest in this suit is such that it is a "proper" party. Moreover, its interest "may be conveniently settled at the same time as the rights and interests of the 'necessary' parties". Its interest, however, is peculiar to itself. As the hearing goes on before the Special Master it may or may not become in conflict with the interests of other Nebraska appropriators whose interests the complainant must accord equal representation. It is submitted that an order should be entered, granting the petitioner leave to intervene.

Respectfully submitted,

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